



DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No.DHS-2011-0114]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security

U.S. Customs and Border Protection, DHS/CBP—017 Analytical Framework for

Intelligence (AFI) System of Records

AGENCY: Privacy Office, DHS.

ACTION: Final rule.

SUMMARY: The Department of Homeland Security is issuing a final rule to amend its regulations to exempt portions of a newly established system of records titled,

“Department of Homeland Security/ U.S. Customs and Border Protection, DHS/CBP—

017 Analytical Framework for Intelligence (AFI) System of Records” from certain

provisions of the Privacy Act. Specifically, the Department exempts portions of the

“Department of Homeland Security/ U.S. Customs and Border Protection, DHS/CBP—

017 Analytical Framework for Intelligence (AFI) System of Records” from one or more

provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

EFFECTIVE DATE: This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Laurence E. Castelli (202-325-0280), CBP Privacy Officer, Office of International Trade,

U.S. Customs and Border Protection, Mint Annex, 799 Ninth Street, NW, Washington, D.C. 20229. For privacy issues please contact: Mary Ellen Callahan (202-343-4010), Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, D.C. 20528.

SUPPLEMENTARY INFORMATION:

Background

The Department of Homeland Security (DHS) U.S. Customs and Border Protection (CBP) published a notice of proposed rulemaking in the Federal Register, 77 FR 33683 (June 7, 2012) proposing to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements. The system of records is the DHS/CBP—017 Analytical Framework for Intelligence (AFI) System of Records. The DHS/CBP—017 Analytical Framework for Intelligence (AFI) system of records notice was published concurrently in the Federal Register, 77 FR 33753, June 7, 2012, and comments were invited on both the Notice of Proposed Rulemaking (NPRM) and System of Records Notice (SORN).

Public Comments

DHS received no comments with respect to the NPRM and five submissions commenting on the SORN.

NPRM

DHS received no comments on the NPRM.

SORN

DHS received twelve distinct comments from four individuals in response to the SORN.

Comment: DHS/CBP received two comments inquiring as to whether or not the results generated from AFI will be released to the public, or if applicable, a statement from DHS that all of the expected results generated will not be permitted to be disclosed to the public.

Response: DHS/CBP has taken an exemption from the access provisions of the Privacy Act for the information created in AFI. The applicability of this exemption will be reviewed in the context of each request for access. DHS/CBP separately may share information generated through AFI with the public, or specific members of the public, in accordance with three specific routine uses identified in the AFI SORN: routine use K where the member of the public is a possible informant; routine use O where the member of the public is possible target of terrorist activity; and routine use Q where the DHS Chief Privacy Officer in consultation with the Office of General Counsel identifies a legitimate public interest in the disclosure of information. In all instances, application of a particular routine use is subject to the limitations set forth in each respective routine use.

Comment: DHS/CBP received one comment requesting the name of the Congressional oversight committees that will have access to the information concerning AFI.

Response: DHS/CBP has briefed the House Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence, and the House Committee on Homeland Security on AFI. These Committees and the Senate Committee on Homeland Security and Government Affairs retain jurisdiction over the purpose and mission of AFI and will receive future briefings upon request and as appropriate. See 5 U.S.C. § 552a(6). The Committees and their staff will not have regular log-in access to AFI.

Comment: DHS/CBP received nine comments related to the staffing requirements, capital costs, and operating costs of AFI and the length of time the system is expected to operate before it must be replaced with new technologies.

Response: This information can be found on the Federal IT Dashboard available through the following link: <http://www.itdashboard.gov/investment?buscid=315>.

After consideration of public comments, the Department will implement the rulemaking as proposed.

List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS amends Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5--DISCLOSURE OF RECORDS AND INFORMATION

1. The authority citation for Part 5 reads as follows:

Authority: Public Law 107-296, 116 Stat. 2135, 6 U.S.C. 101 et seq.; 5 U.S.C. 301.

Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

2. Add at the end of Appendix C to Part 5, the following new paragraph “69”:

Appendix C to Part 5 – DHS Systems of Records Exempt From the Privacy Act

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69. The DHS/CBP—017 Analytical Framework for Intelligence (AFI) System of Records consists of electronic and paper records and will be used by DHS and its components. The DHS/CBP—017 Analytical Framework for Intelligence (AFI) System

of Records is a repository of information held by DHS to enhance DHS's ability to: identify, apprehend, and/or prosecute individuals who pose a potential law enforcement or security risk; aid in the enforcement of the customs and immigration laws, and other laws enforced by DHS at the border; and enhance United States security. This system also supports certain other DHS programs whose functions include, but are not limited to, the enforcement of civil and criminal laws; investigations, inquiries, and proceedings there under; and national security and intelligence activities. The DHS/CBP—017 Analytical Framework for Intelligence (AFI) System of Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other federal, state, local, tribal, foreign, or international government agencies.

(a) The Secretary of Homeland Security has exempted this system from certain provisions of the Privacy Act as follows:

(1) Pursuant to 5 U.S.C. 552a(j)(2), the system is exempt from 5 U.S.C. 552a(c)(3) and (c)(4), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), (f), and (g).

(2) Pursuant to 5 U.S.C. 552a(j)(2), the system (except for any records that were ingested by AFI where the source system of records already provides access and/or amendment under the Privacy Act) is exempt from 5 U.S.C. 552a(d)(1), (d)(2), (d)(3), and (d)(4).

(3) Pursuant to 5 U.S.C. 552a(k)(1), the system is exempt from 5 U.S.C. 552a(c)(3); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f).

- (4) Pursuant to 5 U.S.C. 552a(k)(1), the system is exempt from (d)(1), (d)(2), (d)(3), and (d)(4).
- (5) Pursuant to 5 U.S.C. 552a(k)(2), the system is exempt from 5 U.S.C. 552a(c)(3); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f).
- (6) Pursuant to 5 U.S.C. 552a(k)(2), the system (except for any records that were ingested by AFI where the source system of records already provides access and/or amendment under the Privacy Act) is exempt from (d)(1), (d)(2), (d)(3), and (d)(4).
- (b) Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

- (1) From subsection (c)(3) and (4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.
- (2) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS or another

agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

- (3) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement and national security, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.
- (4) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of the investigation, thereby interfering with that investigation and related law enforcement and national security activities.
- (5) From subsection (e)(3) (Notice to Individuals) because providing such detailed information could impede law enforcement and national security by

compromising the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(6) From subsections (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements) and (f) (Agency Rules), because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(7) From subsection (e)(5) (Collection of Information) because with the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete.

Compliance with subsection (e)(5) would preclude DHS agents from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(8) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS's ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal and could result in disclosure of investigative techniques, procedures, and evidence.

(9) From subsection (g)(1) (Civil Remedies) to the extent that the system is exempt
from other specific subsections of the Privacy Act.

Dated: July 31, 2012

Mary Ellen Callahan

Chief Privacy Officer,

Department of Homeland Security.

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